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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

No. 463.

THE BALTIMORE AND OHIO RAILROAD COMPANY, a Corporation; THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation; and THE PENNSYLVANIA RAILROAD COMPANY, a Corporation,
Petitioners,

vs.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor; FRANK A. THOMPSON, Trustee, St. Louis-San Francisco Railway Company, Debtor; and BERRYMAN HENWOOD, Trustee, St. Louis Southwestern Railway Company, Debtor,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statute Cited.

Public Law 256, 79th Cong., Ch. 573, 1st Session, approved Dec. 12, 1945 3

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STATEMENT.

Petitioners' statement of the matter involved would have been more informative had it made clear the following uncontroverted facts:

Effective April 1, 1940, petitioners and respondents, with other roads, issued a jointly formulated division

sheet[1] by which they agreed upon percentages for division of revenue from all-rail joint rates between Official and Southwestern territories (R. 597, 630, 690, 865, 872). This division sheet did not except the equalizing rates in issue (R. 632, 633). Those equalizing rates are single-factor rates for joint transportation over two railroads (Ex. 13, R. 327; Ex. 17, R. 175; Ex. 21, R. 191; R. 681, 682.) The "single fund" paid by the government results from applying the single-factor rate to the weight of the shipment (R. 681-682). The equalization agreements contain no provisions by which such single-factor rates can be broken down to the "specific sum" for each road claimed by petitioners to result from the equalization agreement (Ex. D-2, R. 1251-1253; Appendix A, Petition herein). In obtaining their so-called "specific sums," petitioners themselves resort to the division sheet for the percentages they apply to the commercial rate in order to get the respective proportions from which they then make the land grant deductions on a territorial basis. The government is interested only in the rate to be paid, not in the division of revenue therefrom between the carriers (Ex. 29, R. 380-383).

QUESTION PRESENTED.

Petitioners' initial reason for granting the writ is that this is the first case presenting a controversy between connecting railroads over the "ownership and distribution" of sums paid by the government for the transporta-

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1 This division sheet, which was printed and distributed among its participating carriers, appears as Exhibit 1 in the Record transmitted to this Court. Its scope and intention, and the rights, obligations, duties and liabilities it confers or imposes, are determinable from the provisions appearing on the first four pages of the document. These pages have been printed as a part of the Record herein (R. 75-81). The remaining pages list the parties to the instrument, the stations covered, and the percentages to be applied, and by stipulation below and in this Court have not been printed as a part of the Record. The original exhibit, comprising the entire document, has been transmitted to this Court as a part of the Record.

tion of freight under land grant equalization agreements. Petitioners do not mention, however, that this also may be the *last* case involving such a controversy. *Public Law 256 —79th Cong. Ch. 573—1st Session*, approved December 12, 1945, terminates land grant deductions on all government traffic effective October 1, 1946. That statute (not cited in the petition but prominently set forth in their brief below when petitioners sought affirmance of the District Court's decree) removes the subject matter upon which land grant equalization agreements operate. Accordingly, such agreements presently in effect will have no bearing on future traffic, and no reason will exist for entering such agreements after October 1, 1946.

The injunction, which petitioners wish this Court to reinstate, as rightly observed by the Circuit Court of Appeals, "does not purport to apply to completed transactions" and "could not do so" under the nature of this case and the evidence introduced (R. 1797). There will be no future transactions to which the decree may apply. The lengthy petition, therefore, reduces itself to the simple point of whether, by reversing that now inoperable decree, the Circuit Court of Appeals established or applied any principles of law that raise a question of substance justifying this Court's review.

The question petitioners present, although variously stated in their petition, comes down to this: were their separate equalization agreements with the government, to which these respondents were not parties and which were filed for the purpose of offering reduced rates for joint transportation, contracts for the division of those rates?

The Circuit Court of Appeals held not. That holding, as we shall show, was wholly consonant with decisions of this Court. It also accords patently with every legal principle and fact involved in deciding it. It, therefore, presents no question of substance for this Court to review.

ARGUMENT.

I.

The Circuit Court of Appeals Rightly Held That the Purpose of the Equalization Agreement Was to Make Rates, Not to Fix Divisions.

The Circuit Court of Appeals recognized that the purpose of the equalization agreement was to make rates, not to fix divisions. Its view accords with the recent decision of this Court in *Southern Railway Co. v. United States* (1944), 322 U. S. 72, 88 L. ed. 1144. There, this Court observed that equalization agreements are "*rate-making agreements*" filed under § 22 of the Interstate Commerce Act. That Section pertains only to the making, not to the division, of reduced rates. Of equalization agreements, which it recognized were designed to obtain government business on both local and through movements, this Court there said (322 U. S. 76):

> "It must be remembered that the equalization agreement was *a rate making agreement.* Its object was to divert shipments to the non-land-grant route. The land-grant route was chosen merely for the purpose of computing the rate . . . The United States was bargaining for low rates for the shipment of its property . . . The *standard* it prescribes is 'the lowest net rates lawfully available.' "[2]

Manifestly, the only function of the equalization agreement is to offer the government a rate meeting that standard. The government is the only other contracting party. It is interested in the rate quoted, not in division of the revenue. That is why, by its letter of May 21, 1935 to one of these petitioners, concerning a divisional clause proposed

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2 All italics in this brief are respondents'.

for insertion in a freight land-grant equalization agreement, the War Department stated (Ex. 29, R. 380-383):

> "It seems to this office that this *is a matter of divisions.* It appears from your reference to the practice obtaining, that the method of divisions in your particular case has been established or settled for some time past. As the matter of division of revenue is *of a private nature* or an *internal arrangement as between and among the carriers,* this office has no official information as to how net revenue accruing on Government shipments may be divided in interline settlements in a particular case.
>
> "However, it is respectfully suggested that this matter of division of net revenue accruing be handled by you with the lines in interest *as a subject of divisions,* rather than by incorporating any restrictive clause or exception in your freight land-grant equalization agreement.
>
> • • • • • • •
>
> "The equalization agreements are *for the purpose* of giving the equalizing carrier traffic and advising the Government that it will be required *only to pay via the equalizing route the lowest net land-grant rate available via any route.* It is earnestly hoped that your lines and the other carriers interested may work out an arrangement whereby the division of net revenue accruing on Government traffic may be adjusted *as a division matter* but not include any such provisions in the equalization agreements."

The effect given to the equalization agreements by the Court below is plainly consonant both with this administrative view and with this Court's decision in the *Southern Railway Company* case.

II.

The Circuit Court of Appeals Rightly Held That a Divisional Formula Can Not Be Imposed by Unilateral Action.

To petitioners' freight land grant equalization agreements with the government these respondents were not parties. In view of that fact, the Circuit Court of Appeals held that petitioners, by provisions inserted in their equalization agreements, could not lawfully force upon these respondents a unilateral formula for division of joint revenues. In so holding, the Court below conformed to principles announced by this Court in *Alton Railroad Company v. U. S.* (1932), 287 U. S. 229, 236, 77 L. ed. 275, 280. There, as here, certain eastern lines, on joint traffic as to which they were the collecting carriers, sought to impose by force on the Alton a division of revenues to which it had not agreed. This Court held the effort unlawful, saying that "unless a readjustment of the divisions has been made either by the parties or by the Commission . . . connecting carriers were legally without power to reduce the divisions of the Alton over its objection." That is what the Circuit Court of Appeals has said of petitioners' like effort in this case (R. 1796-1798).

III.

Essential Element of Any Agreement for the Division of Joint Revenue Is Provision of the Percentages Controlling the Division, Which the Equalization Agreement Does Not Contain.

Every agreement or order for the division of joint revenue by its nature must supply the factors and percentages by which the revenue shall be divided. An agreement lacking such provisions cannot define the proportions by

which revenue computed at a single rate, and paid as a single sum, shall be divided.

Freight land grant equalization agreements do not supply such percentages (R. 40). The reason is clear. They deal with rates, not with divisions. Petitioners would have this Court hold that their equalization agreements "solely" establish divisions. Yet they themselves resort to the division sheet they term inapplicable in order to find the percentages they use in dividing this revenue. That fact alone aptly illustrates the degree to which the equalization agreement falls short of being a contract for division of joint revenue.

IV.

The Circuit Court of Appeals Rightly Held That the District Court Had No Power to Prescribe Divisions of Joint Revenue.

Having rightly determined that the equalization agreement was not a contract for division of joint revenue, and could not lawfully operate to impose such divisions unilaterally, the Circuit Court of Appeals held that by its injunction the District Court in effect had prescribed divisions of joint revenue, and that because such prescription is a legislative, not a judicial, function, the Court had exceeded its powers (R. 1795, 1798). This holding is squarely in accord with the principles announced in *Terminal R. R. Association v. United States* (1924), 266 U. S. 17, 30, 69 L. ed. 151, 156, where this Court said:

> "The making of rates is a legislative, and not a judicial, function.[3] *The division of joint rates is also*

[3] Citing *Keller v. Potomac Electric Co.*, 261 U. S. 428, 440, 67 L. ed. 731, 735, 43 Sup. Ct. Rep. 445; *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287, 289, 64 L. ed. 908, 914, P. U. R. 1920 E, 814, 40 Sup. Ct. Rep. 527; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 305, 58 L. ed. 229, 239, 34 Sup. Ct. Rep. 48; *Interstate Commerce Commission v. United States*, 224 U. S. 474, 483, 56 L. ed. 849, 853, 32 Sup. Ct. Rep. 556; *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 53 L. ed. 150, 158, 29 Sup. Ct. Rep. 67.

> *legislative in character.* The Interstate Commerce Commission is authorized to establish through routes and joint rates, and to prescribe conditions upon which such routes shall be operated, and to fix divisions of such rates among carriers. § 15 (1), (3), (6), Interstate Commerce Act, February 28, 1920; § 418, chap. 91, 41 Stat. at L. 485, 486, Comp. Stat. § 8583, Fed. Stat. Anno. Supp. 1920, p. 107. It is well settled, as a general rule, that the question of the reasonableness of rates or of divisions of joint rates will not be considered by the courts before application has been made to the Commission."

More recently, in *Baltimore and Ohio Railroad Company v. United States* (1936), 298 U. S. 349, 356, 80 L. ed. 1209, 1217, this Court again held that "the prescribing of divisions is a legislative function."[4]

Petitioners, however, assert that the Circuit Court of Appeals "misconstrued and misapplied" this Court's decision in the *Terminal Railroad Association* case. They base that assertion upon the following four reasons (Petition p. 15):

(a) That "there has never been an agreement between these roads overriding the equalization agreements and *providing a basis* for the allocation of revenues accruing under such agreements." Petitioners, for the moment, forget that *the division sheet* has always been regarded by them as providing the percentages by which these revenues are allocated. In supplying these percentages, the division sheet provides the *only* basis that exists for that allocation.

(b) That "for over forty years every road . . . recog-

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4 Citing: *Terminal R. Asso. v. United States*, 266 U. S. 17, 30, 69 L. ed. 150, 155, 45 S. Ct. 5. Cf. *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 227, 53 L. ed. 150, 158, 159, 29 S. Ct. 67; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 305, 307, 58 L. ed. 229, 239, 240, 34 S. Ct. 48.

nized that the revenue to be received . . . under an equalization agreement is governed, not by an agreement between the several roads . . . but *solely* by that road's individual equalization agreement with the Government." If governed *solely* by the equalization agreement, whence come the percentages petitioners themselves apply? They are not found in the equalization agreement. They are established by the division sheet.

(c) That "the equalization agreement of each . . . is in such terms . . . that it never absorbs any land grant deductions or otherwise suffers a diminution of its revenue . . . without its full and complete consent." The division sheet had the full and complete consent of both petitioners and respondents. It is the divisional formula inserted in the equalization agreements that lacks such consent.

(d) That "each of the respondents amended its own equalization agreement *with the Government* . . . contemporaneously with . . . petitioners' agreements *with the Government.*" The fault of this statement is its irrelevancy.

V.

Single-Factor Rates for Joint Transportation Are Joint Rates and Necessarily Produce Joint Revenue to Be Divided by Accepted Principles Governing Such Division.

Petitioners would avoid application of this Court's decisions by the specious argument that the revenue in issue is not joint revenue. They assert that in some manner it consists of "certain specific sums which are owned by (the) connecting roads, and not a single fund of common ownership in which all participating roads have an undivided interest" (Petition, p. 13; Brief, pp. 26-30).

This argument might have some point had these shipments moved under a combination of local rates. Then, perhaps, the revenue from each local rate might be regarded as a "specific sum." *But the equalization agreements do not establish local rates for joint movement.* These equalizing rates are single-factor rates for joint transportation over two railroads (R. 175, 195, 327, 681, 682). The "single fund" comes from applying that single rate to the weight of the shipment. There is no way by which the single rate can be applied to obtain separate "specific sums" for each road. If there were, this controversy would not have arisen. The "specific sums" result from a division of this joint revenue. That division necessarily is made by determining the proportion of the single fund due each road under percentages for dividing joint revenue established by the division sheet.

The government does not make that allocation. It cannot do so through any means supplied by the equalization agreement, which contains no percentages for such allocation. Like any other shipper of property that is jointly transported under a single-factor rate, the government pays the delivering line the full charges computed by applying the single rate to the weight of the shipment (R. 175, 195, 327, 681, 682). It does so, not as a matter of convenience, but because no other rate or sum is established by the equalization agreement.

When petitioners say that the government pays the charges in a single sum merely as a matter of convenience, they imply to this Court that there exists an alternative by which the government could pay each line a specific sum. But petitioners nowhere describe that alternative. Their reticence is understandable. The division sheet, which they assert to be inapplicable, supplies the only means of determining the allocation. From that instrument the petitioners themselves obtain the percentages they use when as collecting lines they divide this revenue. To that

instrument the government would have to resort if it undertook to make the divisions for the carriers in remitting the charges. For until the percentages supplied by the division sheet are applied, there is no "specific sum" in existence or determinable. But neither the government nor any other shipper applies division sheets in paying the charge assessed for joint movement over two lines. Division sheets are operative only between carriers. They are not published to the public like tariffs. They are a private arrangement for dividing revenue *after* it is paid by the shipper. That, and not mere convenience, is why the government makes these payments in a single sum (Ex. 29, R. 380-383).

On this "specific sum" argument petitioners' whole claim to a writ, in ultimate analysis, is based.[5] For unless these equalization rates produce the "specific sums" petitioners assert, they produce the "single fund."

In ordering division of that single fund by a formula to which respondents had not agreed the District Court prescribed division of joint revenue. The holding that this function, being legislative in character, was beyond judicial powers accords fully with the settled doctrine of this Court.

VI.

The Circuit Court of Appeals Did Not Deny to Petitioners Their Rights Under § 22 of the Interstate Commerce Act.

Petitioners assert that in vacating the declaratory and injunctive relief the Circuit Court of Appeals denied them their right under § 22 of the Interstate Commerce Act to

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[5] On page 26 of their brief, petitioners say: "The fundamental error of the Court of Appeals arose out of its belief that the settling road had by some means acquired an undivided property interest in the revenue . . ."

determine the measure of reduced charges to be accorded government traffic.

The measure of reduced charges accorded by the equalization agreements was "the lowest net land grant rate" available. Petitioners remain free, under the decision below, to accord that measure, or any other, under § 22. What the Circuit Court of Appeals said is (R. 1796):

> "Neither can one carrier by inserting conditions and restrictions in its equalizing land grant contract with the government make such restrictions binding upon another carrier without the other carrier's consent."

Manifestly, by this decision the Court below did not deny petitioners their freedom of contract. The Court only found that petitioners' contract was with the government, not with respondents. All that petitioners were denied was the right to impose on respondents, without their consent, petitioners' unilateral formula for dividing joint revenue. Neither § 22 of the Interstate Commerce Act nor any other provision of law confers upon petitioners such a right.

VII.

No Question Regarding Power to Issue Injunction Under Federal Declaratory Judgments Act Is Involved.

Half of petitioners' "questions presented" concern whether the District Court had jurisdiction under the Federal Declaratory Judgments Act to issue the injunction; and among the reasons urged for granting the writ, and the errors specified, petitioners assert that the Circuit Court of Appeals wrongfully denied such jurisdiction. Three of the four judicial precedents cited in the entire petition go likewise to that point.

Yet these respondents have never asserted, nor did the Circuit Court of Appeals hold, that under the Federal Declaratory Judgments Act the District Court was without power, in declaring the meaning of a contract, to implement its declaration with a proper injunction. Indeed, respondents sought an injunction, too (R. 15). What respondents assert, and the Court below held, is that the freight land grant equalization agreement was *not* a contract for the division of joint revenue. Because it was not a contract imposing the divisions that petitioners contend for, the action of the District Court, in enjoining such divisions upon respondents without contractual basis, was a judicial prescription of divisions. This was beyond the Court's powers, as the *Terminal Railroad Association* and *Baltimore & Ohio Railroad Company* cases make utterly clear. The Federal Declaratory Judgments Act manifestly conferred no legislative powers on the District Court.

Further, petitioners assert that reversal of the injunction deprived the District Court of "jurisdiction to resolve the controversy." The petitioners asked the District Court to resolve the controversy by declaring that the divisional formula in their equalization agreements was binding upon respondents. It did so. The Circuit Court of Appeals held the formula *not* binding upon respondents (R. 1798, 1799). That holding reversed the meaning declared for the equalization agreement by the District Court. Reversal of the declaratory relief left nothing for the injunction to implement. The injunction, lacking a contract to enforce, was plainly a prescription of divisions beyond judicial power. To say that the decision below deprived the District Court of power to resolve the controversy is the same as saying that the District Court had an inviolable right to resolve the controversy wrongly.

CONCLUSION.

The petition presents no question of sufficient substance to warrant review by this Court.

Wherefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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